Sykt Sebati Sdn Bhd v Pengarah Jabatan Perhutanan & Anor

FEDERAL COURT (PUTRAJAYA) — APPEAL NO 01(f)-29–06 OF 2017(B)
HASAN LAH, AZAHAR MOHAMED, BALIA YUSOF, JEFFREY TAN AND ALIZATUL KHAIR FCJJ
10 JANUARY 2019

Civil Procedure — Judgment — Res judicata — Plaintiffs appealed against decision granted by Court of Appeal — Whether finding of Court of Appeal that there was no valid and binding logging contract between parties was caught by doctrine of res judicata — Whether Court of Appeal misapplied doctrine of res judicata

Contract — Government contracts — Validity of — Whether s 3 of the Government Contracts Act 1949 applied — Whether by virtue of s 3 Government Contracts Act 1949 only written contracts executed in manner provided thereunder with state government were valid — Whether Court of Appeal misapplied provision of Government Contracts Act 1949 — Government Contracts Act 1949 s 3

The plaintiff applied for a long term sustainable management of forests concession vide letters to the defendants. The first defendant approved the said application by way of a letter ('the letter of approval'). Eventually, almost four years after the issuance of the letter of approval, the first defendant came up with a proposed standard format of agreement for execution ('the draft agreement'). The plaintiff adopted the said format and sent a revised draft agreement to the first defendant ('the draft revised agreement') vide letter. Both the draft agreement and the draft revised agreement contained the termination clause. The defendants did not respond nor did they object to the draft revised agreement. The parties did not execute any formal agreement. Whilst the plaintiff carried on with the logging activities, the first defendant vide letter informed the plaintiff to cease its logging activities immediately on the basis that the areas which it carried out its logging activities were now designated as a reserved forestry area ('the affected area'). By way of letter the first defendant further requested the plaintiff to apply for alternative areas as a replacement for the affected area. The plaintiff identified the alternative areas but was informed by the first defendant by letter that the alternative areas proposed by the plaintiff were unsuitable. The plaintiff did not apply for other alternative areas and the first defendant did not also issue any further logging license or permit to the plaintiff for the affected area. The plaintiff then commenced Shah Alam High Court Civil Suit No 21–136 of 2008 ('Civil Suit 136') against the

defendants on the basis that there was in existence a logging contract between the plaintiff and the defendants based on the letter of approval by the first defendant and the performance thereunder and that the contract was terminated by way of the defendants' conduct and sought for damages for breach of contract. The learned judicial commissioner ('the JC') who heard the case dismissed the plaintiff's claim and made the following findings: (a) there was a valid and binding logging contract between the parties comprising both the letter of approval and the draft revised agreement ('first finding'); and (b) the plaintiff's claim was, however, premature as there was, at the material time, no act of termination nor repudiatory breach of the contract by the defendants ('second finding'). The plaintiff appealed against the second finding in Civil Appeal No B-01–226–06 of 2014 ('Civil Appeal 226') but their appeal was dismissed by the Court of Appeal. The defendants did not appeal against any of the findings of the learned JC, in particular, the first finding. Based on the first finding, the plaintiff wrote to the first defendant requesting the latter to perform the logging contract by granting the plaintiff the license to log. The first defendant responded by issuing a letter stating that it was withdrawing and terminating the letter of approval pursuant to para (j) of the letter of approval ('the letter of termination'). Pursuant thereto, the plaintiff wrote to the first defendant requesting for the appointment of an independent valuer to assess the losses incurred by the plaintiff as a result of the termination of the logging contract. The first defendant refused the plaintiff's request alleging that para (j) of the letter of approval did not oblige the defendants to do so. The plaintiff then commenced Originating Summons No 24–733–06 of 2015 ('Originating Summons 733') in the Shah Alam High Court against the defendants and the learned High Court judge allowed the plaintiff's claim. The learned High Court judge held that res judicata did not apply as the cause of action in Originating Summons 733 was 'totally different' from that in Civil Suit 136 and secondly based on condition (j) of the letter of approval read together with the final draft revised agreement, the plaintiff was entitled to compensation, as assessed by an independent valuer, for the termination. Aggrieved with the decision, the defendants appealed against the said decision to the Court of Appeal ('the COA') and the COA allowed the appeal with costs. Hence, this appeal. Leave of appeal was granted to determine the question of law of whether by virtue of s 3 of the Government Contracts Act 1949 ('the GCA'), only written contracts, executed in the manner provided thereunder with the state government were valid. The issues for determination were: (i) whether the finding of the COA that there was no valid and binding logging contract between the plaintiff and the defendants was caught by the doctrine of res judicata; and (ii) whether s 3 of the GCA applicable to the present case.

Held, allowing the appeal; setting aside the decision of the COA; and restoring the decision of the High Court:

(1) On the facts, it was unequivocally clear that the learned JC had determined Civil Suit 136 on its merits that 'there is a valid and binding logging contract between the parties ... The terms of the logging contract comprise those in the approval letter as well as the draft format agreement ...'. In view of His Lordship unequivocal finding on this issue, there was no doubt that the findings of the COA on this issue was caught by the doctrine of res judicata and therefore unsustainable (see paras 36–37).

(2) The COA fell into error when it exercised its power and jurisdiction to set aside the perfected judgment of the High Court in Civil Suit 136 which was affirmed by the COA in Civil Appeal 226. In setting aside the perfected High Court judgment, the COA had misapplied the doctrine of res judicata. The circumstances alluded to by the COA ie non-consideration of the provisions of the GCA did not fall within the exceptions to the doctrine of res judicata. Given the fact that s 3 of the GCA was neither pleaded nor raised before the learned Judicial Commissioner or the learned High Court judge, the defendants could not seek to rely on the Federal Court case of *Tong Lee Hwa & Anor v Lee Yoke San* [1979] 1 MLJ 24 whereto support its contention that the COA's finding was not caught by the principles of res judicata (see paras 41–43 & 46).

(3) The defendants' contention ie that the learned JC had already decided in Civil Suit 136 on the issue of compensation in the event of termination on grounds of national interest and therefore the issue was res judicata, was misconceived. This was because the learned JC's observation on compensation in para 38 of his judgment was clearly obiter dicta. The learned judge was correct to hold that '... the issue of res judicata does not apply as the cause of action is totally different and has not been decided earlier simply because the issue did not exist earlier' (see paras 50 & 52).

(4) The defendants were not entitled to invoke para (j) of the letter of approval to terminate the logging contract as the learned JC had, in Civil Suit 136 already made a determination on this issue. An issue estoppel had arisen and the defendants were precluded from re-arguing its right to withdraw the entire concession area (the balance of what was left) by invoking para (j) of the letter of approval. The question of whether the logging contract had been repudiated by the issuance of a directive under condition (j) was a matter that was 'necessary to decide' and which was 'actually decided, as the ground work of the decision' in Civil Suit 136 (see paras 54–55 & 57).

(5) Based on the wordings of ss 2 and 3 of the GCA, there was no mandatory requirement for a contract made in Malaysia on behalf of the government or state government to be reduced into writing as both provisions were merely worded in a contemplative manner with the use of the word 'if'. The COA misapplied the provision of the GCA. The GCA should not be

used by the government or state government as 'a cloak for denial of responsibilities'. The lack of a formal contract should not serve as a loophole for the second defendant to deny its contractual responsibilities arising from the logging contract. The conduct of the parties, particularly the defendants' who benefitted from the forest produce cess collection, would make it inequitable for the defendants to now claim that there was no contract to begin with. It was not quite accurate to say that the GCA 'displace(s) the common law position as well as principles relating to contract'. Instead, the GCA complemented the same in contracts made on behalf of the Government or State Government (see paras 69, 75 & 81–82).

(6) For the reasons stated above, the court answered the question of law in the negative. The logging contract was a valid and enforceable contract between the parties and the plaintiff was entitled to claim compensation or damages from the defendant arising from the termination of the said contract (see paras 83–84).

[Bahasa Malaysia summary

Plaintif memohon untuk konsesi pengurusan berterusan jangka panjang hutan melalui surat kepada defendan. Defendan pertama meluluskan permohonan tersebut melalui surat ('surat kelulusan'). Akhirnya, hampir empat tahun selepas pengeluaran surat kelulusan itu, defendan pertama mengeluarkan satu format perjanjian persetujuan standard untuk pelaksanaan ('draf perjanjian'). Plaintif menerima pakai format tersebut dan menghantar draf perjanjian yang disemak semula kepada defendan pertama ('draf perjanjian yang disemak semula') melalui surat. Kedua-dua draf perjanjian dan draf perjanjian yang disemak semula mengandungi klausa penamatan. Defendan-defendan tidak menjawab dan tidak membantah perjanjian draf yang disemak semula tersebut. Pihak-pihak tidak melaksanakan perjanjian formal. Sementara plaintif menjalankan dengan aktiviti pembalakan tersebut, defendan pertama melalui surat memaklumkan kepada plaintif untuk menghentikan aktiviti pembalakannya dengan segera atas dasar bahawa kawasan-kawasan yang dijalankan aktiviti pembalakannya kini ditetapkan sebagai kawasan perhutanan ('kawasan yang terjejas'). Melalui surat defendan pertama selanjutnya meminta plaintif memohon kawasan alternatif sebagai pengganti kawasan yang terjejas. Plaintif mengenal pasti kawasan alternatif tetapi dimaklumkan oleh defendan pertama melalui surat bahawa kawasan alternatif yang dicadangkan oleh plaintif tidak sesuai. Plaintif tidak memohon untuk kawasan alternatif lain dan defendan pertama juga tidak mengeluarkan sebarang lesen pembalakan atau permit kepada plaintif bagi kawasan yang terjejas. Plaintif kemudiannya memulakan Guaman Sivil Mahkamah Tinggi Shah Alam No 21–136 Tahun 2008 ('Guaman Sivil 136') terhadap defendan berdasarkan wujudnya kontrak pembalakan antara plaintif dan defendan berdasarkan surat kelulusan oleh defendan pertama dan prestasi di bawahnya

dan bahawa kontrak itu ditamatkan dengan cara perlakuan defendan dan memohon ganti rugi kerana melanggar kontrak. Pesuruhjaya kehakiman yang bijaksana ('PK') yang mendengar kes itu menolak tuntutan plaintif dan membuat penemuan berikut: (a) terdapat kontrak pembalakan yang sah dan mengikat di antara pihak-pihak yang terdiri daripada surat kelulusan dan draf perjanjian yang disemak semula ('penemuan pertama'); dan (b) tuntutan plaintif adalah, walau bagaimanapun, pramatang seperti yang berlaku, pada masa yang material, tiada tindakan penamatan atau penolakan kontrak oleh defendan ('penemuan kedua'). Plaintif merayu terhadap keputusan kedua dalam Rayuan Sivil No B-01–226–06 Tahun 2014 ('Rayuan Sivil 226') tetapi rayuan mereka telah ditolak oleh Mahkamah Rayuan. Defendan-defendan tidak merayu terhadap sebarang penemuan PK yang bijaksana, khususnya, penemuan pertama. Berdasarkan penemuan pertama, plaintif menulis kepada defendan pertama meminta untuk melaksanakan kontrak pembalakan dengan memberikan plaintif lesen untuk membalak. Defendan pertama menjawab dengan mengeluarkan surat yang menyatakan bahawa ia telah menarik dan menamatkan surat kelulusan menurut perenggan (j) surat persetujuan ('surat penolakan'). Selaras dengan itu, plaintif menulis kepada defendan pertama meminta pelantikan penilai bebas untuk menilai kerugian yang ditanggung oleh plaintif akibat penamatan kontrak pembalakan. Defendan pertama menolak permintaan plaintif yang menyatakan bahawa perenggan (j) surat persetujuan tidak mewajibkan defendan-defendan melakukannya. Plaintif kemudian memulakan Saman Pemula No 24–733–06 tahun 2015 ('Saman Pemula 733') di Mahkamah Tinggi Shah Alam terhadap defendan dan Hakim Mahkamah Tinggi yang bijkasana membenarkan tuntutan plaintif. Hakim Mahkamah Tinggi yang bijaksana berpendapat bahawa res judicata tidak terpakai kerana tindakan di Saman Pemula 733 adalah 'sama sekali berbeza' daripada Guaman Sivil 136 dan kedua berdasarkan syarat (j) surat kelulusan dibaca bersama dengan draf perjanjian akhir yang disemak semula, plaintif berhak untuk pampasan, seperti yang dinilai oleh penilai bebas, untuk penamatan. Terkilan dengan keputusan itu, defendan-defendan merayu terhadap keputusan tersebut kepada Mahkamah Rayuan ('MR') dan MR membenarkan rayuan dengan kos. Oleh itu, rayuan ini. Kebenaran rayuan telah diberikan untuk menentukan persoalan undang-undang sama ada menurut s 3 Akta Kontrak Kerajaan 1949 ('Akta'), hanya kontrak bertulis, dilaksanakan mengikut cara yang diberikan di bawahnya dengan kerajaan negeri adalah sah. Isu-isu untuk penentuan adalah: (i) sama ada penemuan MR bahawa tiada kontrak pembalakan yang sah dan mengikat antara plaintif dan defendan melibatkan oleh doktrin res judicata; dan (ii) sama ada s 3 Akta terpakai untuk kes ini.

Dipututskan, membenarkan rayuan; mengetepikan keputusan MR; dan mengembalikan keputusan Mahkamah Tinggi:

(1) Pada fakta, jelas bahawa PK yang bijaksana telah menentukan Guaman

Sivil 136 atas meritnya bahawa 'there is a valid and binding logging contract between the parties ... The terms of the logging contract comprise those in the approval letter as well as the draft format agreement ...'. Memandangkan penemuannya yang jelas mengenai isu ini, tiada keraguan bahawa penemuan MR mengenai isu ini melibatkan doktrin res judicata dan oleh itu tidak dapat dikekalkan (lihat perenggan 36–37).

(2) MR terkhilaf apabila ia melaksanakan kuasa dan bidang kuasa untuk mengetepikan penghakiman yang disempurnakan Mahkamah Tinggi dalam Guaman Sivil 136 yang telah disahkan oleh MR dalam Rayuan Sivil 226. Dalam mengetepikan penghakiman Mahkamah Tinggi yang sempurna, MR telah menyalahgunakan doktrin res judicata. Keadaan yang dinyatakan oleh MR iaitu tidak mempertimbangkan peruntukan Akta tidak termasuk dalam pengecualian kepada doktrin res judicata. Memandangkan hakikat bahawa s 3 Akta tidak pernah diplidkan atau dibangkitkan di hadapan PK yang bijaksana atau hakim Mahkamah Tinggi yang bijaksana, defendan-defendan tidak boleh memohon untuk bergantung kepada kes Mahkamah Persekutuan *Tong Lee Hwa & Anor v Lee Yoke San* [1979] 1 MLJ 24 yang menyokong pendapatnya bahawa keputusan MR tidak melibatkan prinsip res judicata (lihat perenggan 41–43 & 46).

(3) Pertikaian defendan iaitu PK yang bijaksana telah memutuskan dalam Guaman Sivil 136 mengenai isu pampasan sekiranya berlaku penamatan berdasarkan alasan kepentingan negara dan oleh itu isu tersebut adalah res judicata, adalah salah faham. Ini adalah kerana pemerhatian PK yang bijaksana mengenai pampasan dalam perenggan 38 penghakimannya adalah jelas obiter dicta. Hakim yang bijaksana adalah betul untuk menegaskan bahawa '... the issue of res judicata does not apply as the cause of action is totally different and has not been decided earlier simply because the issue did not exist earlier' (lihat perenggan 50 & 52).

(4) Defendan-defendan tidak berhak untuk membangkitkan perenggan (j) surat kelulusan untuk menamatkan kontrak pembalakan kerana PK yang bijaksana telah, dalam Guaman Sivil 136 telah membuat penentuan mengenai isu ini. Satu isu estoppel telah timbul dan defendan-defendan dihalang daripada berhujah semula haknya untuk menarik balik keseluruhan kawasan konsesi (baki apa yang ditinggalkan) dengan membangkitkan perenggan (j) surat kelulusan. Persoalan sama ada kontrak pembalakan itu ditolak dengan pengeluaran arahan di bawah syarat (j) adalah perkara yang 'perlu untuk diputuskan' dan yang 'sebenarnya diputuskan, sebagai asas keputusan tersebut' dalam Guaman Sivil 136 (lihat perenggan 54–55 & 57).

(5) Berdasarkan kata-kata ss 2 dan 3 Akta, tiada syarat mandatori untuk kontrak yang dibuat di Malaysia bagi pihak kerajaan atau kerajaan negeri untuk diubah ke dalam bentuk bertulis kerana kedua-dua peruntukan

hanya ditulis dengan cara yang kontemplatif dengan menggunakan perkataan 'jika'. MR menyalahgunakan peruntukan Akta. Akta tidak boleh digunakan oleh kerajaan atau kerajaan negeri sebagai 'selubung untuk penolakan tanggungjawab'. Kekurangan kontrak formal tidak seharusnya menjadi kelemahan bagi defendan kedua untuk menafikan tanggungjawab kontraknya yang timbul daripada kontrak pembalakan. Kelakuan pihak-pihak, terutamanya defendan-defendan yang mendapat manfaat dari hasil hutan menghasilkan koleksi cess, akan menjadikannya tidak adil bagi defendan-defendan untuk sekarang mendakwa bahawa tidak ada kontrak untuk dimulakan. Ia tidak cukup tepat untuk mengatakan bahawa Akta 'menggantikan kedudukan undang-undang umum serta prinsip-prinsip yang berkaitan dengan kontrak'. Sebaliknya, Akta melengkapkan yang sama dalam kontrak yang dibuat bagi pihak kerajaan atau kerajaan negeri (lihat perenggan 69, 75 & 81–82).

(6) Atas sebab-sebab yang dinyatakan di atas, mahkamah menjawab persoalan undang-undang dalam keadaan negatif. Kontrak pembalakan tersebut adalah kontrak yang sah dan boleh dikuatkuasakan di antara pihak-pihak dan plaintif berhak menuntut pampasan atau ganti rugi daripada defendan yang timbul daripada penamatan kontrak tersebut (lihat perenggan 83–84).]

Notes

For cases on government contracts in general, see 3(3) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 5637–5674.

For cases on res judicata, see 2(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5351–5354.

Cases referred to

Arnold and others v National Westminister Bank plc [1991] 3 All ER 41; [1991] 2 AC 93, HL (refd)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393; [1998] 2 CLJ 75, FC (refd)

Chatturbhuj Vithaldas Jasani v Moreshwar Parashram And Others 1954 AIR 236, SC (refd)

Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd [2001] 4 MLJ 346, CA (refd)

Chor Phaik Har v Farlim Properties Sdn Bhd [1994] 3 MLJ 345; [1994] 4 CLJ 285, FC (refd)

Dato' Tan Chin Woh v Dato' Yalumallai @ M Ramalingam s/o V Muthusamy [2016] 5 MLJ 590; [2016] 8 CLJ 293, FC (refd)

Government of India v Petrocon India Ltd [2016] 3 MLJ 435; [2016] 6 CLJ 321, FC (refd)

Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143, FC (refd)

Joseph bin Paulus Lantip & Ors v Unilever Plc [2018] supp MLJ 151; [2012] 7 CLJ 693, FC (refd)

KP Chowdhary v State Of Madhya Pradesh & Ors 1967 AIR 203; 1966 SCR (3) 919, SC (refd)
Nippon Express (M) Sdn Bhd v Che Kiang Realty Sdn Bhd and another appeal [2013] MLJU 1646; [2013] 7 CLJ 713, CA (refd)
Petrojasa Sdn Bhd v The State Government of Sabah [2002] MLJU 223, HC (refd)
Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd [2013] 5 MLJ 1, FC (refd)
Seth Bikhraj Jaipuria v Union Of India 1962 AIR 113, SC (refd)
Tong Lee Hwa & Anor v Lee Yoke San [1979] 1 MLJ 24, FC (refd)
Union of India & Others v NK Private Limited & Another 1972 AIR 915; (1973) 3 SCC 388, SC (refd)
Union of India v AL Rallia Ram 1963 AIR 1685, SC (refd)
Westech Sdn Bhd (in voluntary liquidation) v Thong Weng Lock (as surviving partner of Thong Kee Trading Co) [2014] 3 MLJ 427, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 78
Government Contracts Act 1949 ss 2, 3, 8
Government of India Act 1935 [IND] s 175(3)
Constitution of India [IND] art 299, 299(1)
National Forestry Act 1984
Selangor Forestry Rules 1988

Appeal from: Civil Appeal No B-01(A)-72–03 of 2016 (Court of Appeal, Putrajaya)

Malik Imtiaz Sarwar (K Kirubakaran, Ramanathan Pillai, Nadzarin bin Wok Nordin, Chan Wei June and Wong Jing En with him) (Nadzarin Kuok Puthucheary & Tan) for the appellant.
Nik Suhaimi bin Nik Sulaiman (Wan Norazimin bt Kassim with him) (Selangor State Legal Advisor, Selangor State Legal Advisor's Office) for the respondents.

Alizatul Khair FCJ (delivering judgment of the court):

INTRODUCTION

[1] This judgment is delivered pursuant to s 78 of the Courts of Judicature Act 1964 as our brothers Hasan bin Lah and Jeffrey Tan have since retired. This is a unanimous decision by the remaining members of the panel who heard this appeal.

[2] The appeal before us arose out of the decision of the Court of Appeal on 7 December 2016 in Civil Appeal No B-01(A)-72–03 of 2016 where it had allowed the appeal of the respondents (the defendants in the court below)

against the decision of the High Court in Originating Summons No 24–733–06 of 2015 dated 16 February 2016.

[3] Leave to appeal was granted by this court on 31 May 2017 to determine the following question of law:

> Whether by virtue of section 3, Government Contracts Act 1949 ('GCA'), only written contracts, executed in the manner provided thereunder with the state government are valid.

[4] For convenience, parties in this judgment will be referred to as they were referred to in the High Court.

FACTUAL BACKGROUND

[5] The factual background leading to this appeal is important to give context to the question before us. We propose for this purpose to adopt the plaintiff's (the appellant before us) submission with some modification.

[6] The plaintiff applied for a long term sustainable management of forests concession vide letters dated 11 April 1996 and 15 May 1999 to the defendants.

[7] The first defendant approved the said application by way of a letter dated 30 September 1999 ('the letter of approval'). The plaintiff was given the right to carry out logging activities in *Hutan Simpan Gading* and *Bukit Belata*, which were approximately 9,000 hectares (the 'Concession Areas'). The terms contained in the letter of approval are, namely:

> (a) Satu Perjanjian hendaklah ditandatangani di antara Kerajaan Negeri dan pihak Syarikat Sebati Sdn Bhd dalam masa 6 bulan kelulusan diberikan;
>
> ...
>
> *(j) Kerajaan Negeri juga berhak menarik balik semua atau sebahagian kawasan bila-bila masa apabila diperlukan.* (Emphasis added.)

[8] Pursuant to the letter of approval, the plaintiff sent a draft agreement vide letter dated 16 November 1999 to the first defendant. There was no response from the defendants notwithstanding the six month requirement stipulated in the letter of approval.

[9] In the meantime, the plaintiff was permitted to commence and carry out logging activities. The defendants were aware of the on-going activities, in particular the first defendant who approved and issued logging licenses to the plaintiff pursuant to the National Forestry Act 1984 and the Selangor Forestry

Rules 1988. The plaintiff also paid the necessary cess and premium for the licenses.

[10] The plaintiff wrote again to the first defendant, vide letter dated 5 September 2001, with a draft agreement but did not receive any reply.

[11] Eventually, almost four years after the issuance of the letter of approval, the first defendant, vide letter dated 10 May 2003, responded with a proposed standard format of agreement for execution ('the draft agreement'). The plaintiff adopted the said format and sent a revised draft agreement to the first defendant (the 'draft revised agreement') vide letter dated 7 July 2003. Both the draft agreement and the draft revised agreement contained the following termination clause ('the termination clause'):

> M. TERMINATION ON NATIONAL INTEREST
>
> (a) Notwithstanding any provision of this Agreement, the Government may terminate this Agreement by giving not less than sixty (60) days notice to that effect to the Company (without any obligation to give reason thereof) if it considers that such termination is necessary for national interest, in the interest of national security or for the purposes of Government policy or public policy.
>
> (b) Upon such termination, the Company shall be entitled to compensation which shall be determined by an independent auditor appointed by the Government after due consultation with the Company.
>
> For the purposes of this Clause, what constitute 'national interest', 'interest of national security', 'the Government policy' and 'public policy' shall be solely made and determined by the Government and such determination shall for all intent and purposes be final and conclusive and shall not be open to challenge whatsoever.

[12] The defendants did not respond nor did they object to the draft revised agreement. It is not disputed that parties did not execute any formal agreement.

[13] Whilst the plaintiff carried on with the logging activities, the first defendant, vide letter dated 5 October 2005, informed the plaintiff to cease its logging activities immediately on the basis that the areas which it carried out its logging activities were now designated as a reserved forestry area (the affected area). By way of letter dated 27 December 2005 the first defendant further requested the plaintiff to apply for alternative areas as a replacement for the affected area.

[14] The plaintiff identified the alternative areas but was informed by the first defendant, by letter dated 20 February 2006, that the alternative areas proposed by the plaintiff were unsuitable. The plaintiff did not apply for other alternative areas and the first defendant did not also issue any further logging

A license or permit to the plaintiff for the affected area.

[15] The plaintiff then commenced Shah Alam High Court Civil Suit No 21–136 of 2008 ('Civil Suit 136') against the defendants on the basis that there was in existence a logging contract between the plaintiff and the B defendants based on the letter of approval and the performance thereunder and that the contract was terminated by way of the defendants' conduct and sought for damages for breach of contract.

C **[16]** The learned judicial commissioner who heard the case dismissed the plaintiff's claim. In doing so, the learned judicial commissioner made the following findings which, as we shall see later forms the crux of this appeal:

(a) there was a valid and binding logging contract (the logging contract) between the parties comprising both the letter of approval and the draft D revised agreement ('first finding'); and

(b) the plaintiff's claim was, however, premature as there was, at the material time, no act of termination nor repudiatory breach of the contract by the defendants ('second finding').

E

[17] The plaintiff appealed against the second finding in Civil Appeal No B-01–226–06 of 2014 ('Civil Appeal 226') but their appeal was dismissed by the Court of Appeal on 10 March 2015. It should be noted that the defendants did not appeal against any of the findings of the learned judicial F commissioner, in particular, the first finding.

[18] Based on the first finding, the plaintiff wrote to the first defendant requesting the latter to perform the logging contract by granting the plaintiff the license to log. The first defendant responded by issuing a letter on 27 April G 2015, stating that it is withdrawing and terminating the letter of approval pursuant to para (j) of the letter of approval (the letter of termination)

[19] Pursuant thereto, the plaintiff wrote to the first defendant on 15 May H 2015 requesting for the appointment of an independent valuer to assess the losses incurred by the plaintiff as a result of the termination of the logging contract. The first defendant refused the plaintiff's request alleging that para (j) of the letter of approval did not oblige the defendants to do so.

I **[20]** The plaintiff then commenced Originating Summons No 24–733–06 of 2015 ('Originating Summons 733') in the Shah Alam High Court against the defendants for, inter alia:

(a) a declaration that the first defendant's letter dated 27 April 2015 constitutes a termination of the logging contract as evidenced by the

letter of approval dated 30 September 1999 and the final draft agreement as determined by the High Court on 19 May 2014 vide the Shah Alam High Court Civil Suit No 136;

(b) damages; and

(c) the appointment of an independent valuer for the purposes of the assessment of damages.

[21] The learned High Court judge allowed the plaintiff's claim basing his decision principally on these two issues:

(a) whether res judicata applied to the plaintiff's claim for damages as it was already decided in Civil Suit 136 and subsequently affirmed by the Court of Appeal in Civil Appeal 226; and

(b) what were the consequences of the letter of termination by the defendants under condition (j) of the letter of approval?

[22] The plaintiff took the position that the defendant's decision to withdraw or terminate the letter of approval was in pursuance of their policy to cease all logging activities in the concession areas. Thus taking into consideration the logging contract as a whole it was entitled to damages pursuant to termination cl (M) of the draft agreement.

[23] The defendants on the other hand contended that res judicata applied as the learned judicial commissioner in Civil Suit 136 had already decided on the issue of compensation in the event of termination on ground of national interest. They further contended that the termination was based on condition (j) of the approval letter which gave them the right to terminate and the termination was not on the basis of national interest as stated in the termination clause of the draft agreement.

[24] The learned High Court judge held that res judicata did not apply as the cause of action in Originating Summons 733 is 'totally different' from that in Civil Suit 136 and secondly based on condition (j) of the letter of approval read together with the final draft revised agreement, the plaintiff is entitled to compensation, as assessed by an independent valuer, for the termination.

[25] Aggrieved with the decision, the defendants appealed against the said decision to the Court of Appeal. The Court of Appeal allowed the appeal with costs.

FINDINGS OF THE COURT OF APPEAL

[26] In arriving at its decision, the court made the following findings:

(a) In the instant case, there are two documents which are said to be evidence of a contract. The only document where both parties agreed to binding is the 'Approval Letter'. The plaintiff's assertion is that the termination must be pursuant to clause M of the draft agreement. The defendants' assertion is that the termination ought to be based on the 'Approval Letter'. *There was no evidence led by the plaintiff in the Originating Summons for this court to ascertain based on which agreement the parties were proceeding with the conduct of the business.* This court is not bound by the grounds of decision of the first judgment, though the decision of the court is relevant. The decision of the court as we had said earlier was that the plaintiff's claim was premature and in consequence was dismissed with costs. In our view, the plaintiff's failure to lead evidence on which agreement the parties were conducting on day to day affairs is fatal to the plaintiff's case.

(b) To say that the 'Approval Letter' as well as the draft agreement had become one contract is not sustainable in law. It is either the terms of the 'Approval Letter' or the terms of the draft agreement. Any construction otherwise by the courts will breach the rule as to the requirement of 'certainty of terms' (see *Air Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754; *Kam Mah Theatre Sdn Bhd v Tan Lay Soon* [1994] 1 MLJ 108).

(c) In addition, we are not prepared to condone the proposition of the learned Judicial Commissioner in the first judgment which was followed by the learned judge in the instant case that 'the Defendants had acquiesced to those terms' when ss 2 and 3 of the GCA 1949 requirements have not been met.

OUR FINDINGS

[27] It is apparent from the above findings that the Court of Appeal's main ground for allowing the appeal was that they were not satisfied that there was in existence a valid and binding logging contract between the parties as found by the learned judicial commissioner in Civil Suit 136. This is reflected in their findings (above) which in summary read as follows:

(a) 'In our view, the plaintiff's failure to lead evidence on which agreements the parties were conducting on day to day affairs is fatal to the plaintiff's case';

(b) To say that the 'Approval Letter' as well as the draft agreement had become one contract is not sustainable in law'; and

(c) 'Both the learned Judicial Commissioner and the learned judge erred when they held that 'the Defendants had acquiesced to those terms when sections 2 and 3 of GCA 1949 requirements have not been met'.'

In relation to ground (c), the Court of Appeal was of the view that:

> ... *the government and/or government bodies may not be liable on the basis of 'conduct' and/or implied contract and/or acquiescence, etc.; to conclude that there was in fact a contract based* on a draft agreement which has not been duly executed.
>
> ... the draft agreement in law cannot be construed as a contract without execution as well as evidence that it has been executed as per the requirement of GCA 1949. (Emphasis added.)

(See pp 7–8 of *ikatan teras responden Bah* 1 and 2).

This last ground (c) relied on by the Court of Appeal to reverse the finding of the learned High Court judge resulted in this court granting the plaintiff leave to appeal on the question of law as set out in para [2] above.

[28] The findings of the Court of Appeal (above) gave rise to two issues:

(a) whether the finding of the Court of Appeal that there was no valid and binding logging contract between the plaintiff and the defendants was caught by the doctrine of res judicata; and

(b) whether s 3 of the Government Contracts Act 1949 ('the GCA') apply to the present case.

This second issue relates directly to the question of law before us (see para 2, ante).

Whether the finding of the Court of Appeal that there was no valid and binding logging contract between the plaintiff and the defendants was caught by the doctrine of res judicata

[29] The plaintiff argued that the issue of whether there was in existence a valid and binding contract had already been determined by the learned judicial commissioner in Civil Suit 136 who found that the letter of approval and the draft agreement constituted a valid and binding logging contract between the parties. As stated earlier, there was *no appeal* specifically against this finding by the defendant. As such the decision of the learned judicial commissioner on this issue had become res judicata.

[30] The defendant whilst conceding that they did not appeal against the learned judicial commissioner's specific finding on this issue, nevertheless contended that the said logging contract was not a valid contract because it did not comply with s 3 of the GCA.

[31] As the issue of the applicability of s 3 of the GCA was not an issue in Civil Suit 136 the defendants submitted that the decision of the Court of

Appeal on this issue was not caught by the doctrine of res judicata. The defendants relied on the case of *Tong Lee Hwa & Anor v Lee Yoke San* [1979] 1 MLJ 24 where the Federal Court decided that the plea of res judicata was not sustainable as it had not been shown that the earlier judgment necessarily and with precision determined the point in issue, which in that case relate to the liability of the appellants to pay the respondent for work done at their request.

[32] The defendants' submission found favour with the Court of Appeal when it found as follows:

> Further, we take the view that the principles of res judicata on the facts are not applicable. The plaintiff's reliance on the principles of res judicata here is misconceived taking into consideration the provision of GCA 1949.

[33] In holding as such, the Court of Appeal relied extensively on the Court of Appeal case of *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346 (CA) where the court in essence held that as the doctrine of *res judicata* (whether in its narrow or broader sense) is designed to achieve justice, a court may decline to apply it where to do so would lead to an unjust result.

[34] Firstly, on the issue of res judicata, it is necessary to reiterate the elements which constitute res judicata. For this purpose we find the book Spencer Bower and Turner *Res Judicata* (3rd Ed, 1996) particularly useful. There the learned authors sets out at p 10, para 19 what is involved in the burden of showing res judicata which consist of six matters:

(i) the decision was judicial in the relevant sense;

(ii) it was in fact pronounced;

(iii) the tribunal had jurisdiction over the parties and the subject matter;

(iv) the decision was — (a) final, and (b) on the merits;

(v) it determined the same questions as that raised in the later question; and

(vi) the parties to the later litigation were either parties to the earlier litigation or their privies, or the earlier decision was in rem.

[35] The learned authors further stated that the determination must not be collateral to the decision and for this one has to look at the formal judgment or order. Where an express declaration as to any particular question or issue appears on the face of the record of a formal judgment or where from the judgment itself the actual grounds of the decision can be clearly ascertained, there is no necessity for further search.

[36] On the facts herein, it is unequivocally clear that the learned judicial commissioner had determined Civil Suit 136 on its merits that 'there is a valid

and binding logging contract between the parties ... The terms of the logging contract comprise those in the approval letter as well as the draft format agreement ...' when His Lordship held:

> 28. Accordingly, I find and hold that there is a valid and binding logging contract comprise those in the Approval Letter as well as the draft formal agreement following the Court of Appeal case of *Nippon Express (M) Sdn Bhd v Che Kiang Realty Sdn Bhd and another appeal* [2013] MLJU 1646; [2013] 7 CLJ 713 since the latter was not contested by the defendants in any way. In other words, the defendants had acquiesces to those terms.

[37] In view of His Lordship's unequivocal finding on this issue, there is no doubt in our minds that the findings of the Court of Appeal on this issue is caught by the doctrine of res judicata and therefore unsustainable.

[38] Further it is trite that a High Court is not empowered to set aside a perfected judgment of another High Court save and except where the final judgment of the High Court is proved to be null and void on the ground of illegality or lack of jurisdiction as determined in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; [1998] 2 CLJ 75 and further confirmed in the fairly recent case of *Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd* [2013] 5 MLJ 1.

[39] This principle applies equally to the Court of Appeal which cannot set aside a final order regularly obtained from another coram of the Court of Appeal of concurrent jurisdiction except in the limited circumstances set out earlier.

[40] This was established in the case of *Westech Sdn Bhd (in voluntary liquidation) v Thong Weng Lock (as surviving partner of Thong Kee Trading Co)* [2014] 3 MLJ 427 where Abdul Aziz JCA (as he then was) speaking for the Court of Appeal held as follows:

> [41] ... Further, in this case the Court of Appeal's order had been perfected and sealed. This fact is not in dispute. In this regard we agree with the submission by learned counsel for the defendant that the *Court of Appeal has inherent jurisdiction to review its own previous decision on limited grounds and only in very exceptional circumstances*.
>
> ...
>
> At this juncture we also mention the principle deduced from the Federal Court's decision in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 that a High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction except where the order or judgment could be proved to be null and void on the ground of illegality or lack of jurisdiction. *Corollary, the same principle applies to a coram of Court of Appeal hearing an appeal against the order of another coram of the Court of Appeal of*

A *concurrent jurisdiction.* (Emphasis added.)

[41] We would therefore agree with learned counsel for the plaintiff that the Court of Appeal fell into error when it exercised its power and jurisdiction to set aside the perfected judgment of the High Court in Civil Suit 136 which was affirmed by the Court of Appeal in Civil Appeal 226.

[42] We further agree that in setting aside the perfected High Court judgment, the Court of Appeal had misapplied the doctrine of res judicata. It will be recalled that the Court of Appeal in holding that the principles of res judicata do not apply on the facts of this case, relied on the Court of Appeal decision in *Chee Pok Choy & Ors* where Gopal Sri Ram JCA (as he then was) expounded the following view:

> Now, there is a dimension to the doctrine of res judicata that is not always appreciated. It is this. *Since the doctrine* (whether in its narrow or broader sense) *is designed to achieve justice, a court may decline to apply it where to do so would lead to an unjust result.* And there is respectable authority in support of the view I have just expressed.
>
> ...
>
> On the authorities discussed thus far, the principle comes to this. *Whether res judicata in the wider sense should be permitted to bar a claim is a matter that is to be determined on the facts of each case, always having regard to where the justice of the individual and particular case lies*. (Emphasis added.)

[43] It is clear however from decided cases that the circumstances alluded to by the Court of Appeal (ie non-consideration of the provisions of the GCA 1949) do not fall within the exceptions to the doctrine of res judicata which are limited to the following situations: fraud or where evidence not available at the original hearing becomes available (see *Arnold and others v National Westminister Bank plc* [1991] 3 All ER 41; [1991] 2 AC 93 and *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143). Whether an 'unjust result' or the justice of the case constitutes a further exception to the doctrine of res judicata remains to be seen. For the moment, based on decided cases (as seen above) it is not yet a recognised exception to the doctrine of res judicata.

[44] Quite apart from not falling within the limited exceptions to the doctrine of res judicata, it was also the contention of the plaintiff that the application or rather the failure to apply s 3 of the GCA was never pleaded nor raised in Civil Suit 136 and Originating Summons 733. In fact learned counsel contended that it was only raised for the first time, in the defendant's written submission before the Court of Appeal in Civil Appeal 72 as an afterthought. The fact that the issue of the GCA was not stated in the defendant's memorandum of appeal for Civil Appeal 72 is ample proof of it being an afterthought.

[45] Learned counsel drew the court's attention to the case of *Dato' Tan Chin Woh v Dato' Yalumallai @ M Ramalingam s/o V Muthusamy* [2016] 5 MLJ 590; [2016] 8 CLJ 293 where this court cautioned against the Court of Appeal exercising its jurisdiction in considering an issue not expressly raised in the memorandum of appeal or argued before the Court of Appeal.

[46] In our view as this court had granted leave to appeal on a question of law pertaining specifically to s 3 of the GCA, it is not necessary for us to consider whether the Court of Appeal had exercised its jurisdictional power correctly in deliberating and determining an issue which was neither pleaded nor raised in the court below nor stated as a ground of appeal in the defendant's memorandum of appeal. Suffice it for us to state that given the fact that s 3 of the GCA was neither pleaded nor raised before the learned judicial commissioner or the learned High Court judge, the defendants cannot seek to rely on the Federal Court case of *Tong Lee Hwa & Anor* to support its contention that the Court of Appeal's finding is not caught by the principles of res judicata.

[47] Before addressing the issue on s 3 of the GCA and the question of law relating thereto, we would like for completeness to deal with the defendant's contention that the issue of compensation in the event of termination on the ground of national interest is res judicata.

[48] The defendants contended that the termination of the logging contract was based on condition (j) of the letter of approval which gave them the right to terminate and the termination was not on the basis of national interest as provided in the termination clause of the draft revised agreement (cl M). Consequently no compensation is payable to the plaintiff.

[49] It was contended further that the learned judicial commissioner had already decided in Civil Suit 136, on the issue of compensation in the event of termination on grounds of national interest and therefore the issue is now res judicata.

[50] We agree with the plaintiff that the defendants' contention on this issue is misconceived for the following reasons:

(a) there were only two issues for determination before the learned judicial commissioner in Civil Suit 136 as seen from the following excerpt of his judgment:

> There are essentially two issues for determination at this stage of the trial on liability, to wit: firstly *whether there was binding contract between the parties* and secondly, *if there was a binding contract, whether the contract was terminated and the consequences thereto*. (Emphasis added.)

Pursuant thereto, the learned judicial commissioner had decided, as regards the first issue, that there was a valid and binding logging contract between the parties and in relation to the second issue the learned judicial commissioner found as follows:

> 37. As to the consequences of the exercise of the power conferred by condition (j) of the Approval Letter, *I find and hold that it does not attract clause M on Termination on National Interest in the Draft Formal Agreement because the logging contract was not in substance terminated in entirety.* Furthermore there was at all material times no act of termination of the logging contract by the second Defendant or the First Defendant on its behalf. In other words, the logging contract subsisted as far as the Defendants are concerned. *Since, I have also found and held that the Plaintiff was not in the position to justify that the contract was terminated as well for repudiatory breach, there is accordingly no compensation or damages payable by the Defendants either through clause M or at common law*. (Emphasis added.)

Having found that the defendants had not repudiated for terminated the logging contract to justify the plaintiff's claim for compensation or damages, the learned judicial commissioner went on to make the following observation at para 38 of his judgment:

> 38. I note that condition (j) of the approval letter is silent on the financial consequence if that provision is exercised. As a matter of general principle, I hold that since it is a right accorded by the contract, it cannot attract compensation unless it is expressly so provided or if the condition was exercised in bad faith. Based on the circumstances herein where condition (j) had been exercised in the national interest, I hence find and hold that there is no compensation payable by the defendants to the plaintiff ...

(b) the learned judicial commissioner's observation on compensation in para 38 of his judgment was clearly obiter dicta as correctly held by the learned judge in Originating Summons 733. In holding that the said para 38 was obiter, the learned judge opined as follows:

> A careful reading of this judgment shows the ratio of the case is as stated in para 37 of the judgment. Paragraph 38 is merely an obiter dicta. In para 38 the learned judicial commissioner is just expressing an opinion as to what the consequence would be in the event the defendants chose to terminate the contract under condition (j).

[51] We agree with the learned judge's view as this is palpably clear from a reading of paras 37–38 of the learned judicial commissioner's judgment (above).

[52] In the premises the learned judge was correct to hold that '... the issue of res judicata does not apply as the cause of action is totally different and has not been decided earlier simply because the issue did not exist earlier'.

[53] The issue of compensation arose only after the issuance of the letter of termination by the defendants which letter was issued after Civil Suit 136 had been disposed of. It will be recalled that the plaintiff's appeal (Civil Appeal 226) was dismissed by the Court of Appeal on *10 March 2015*. The letter of termination was issued in *27 April 2015*.

[54] We would however agree with the plaintiff's contention that the defendants are not entitled to invoke para j of the letter of approval to terminate the logging contract as the learned judicial commissioner had, in Civil Suit 136 already made a determination on this issue. This is apparent from paras 33–37 of His Lordship's judgment. At para 33, His Lordship found as regards para (j) of the letter of approval as follows:

> The letter of 5 October 2005 is upon its true construction an exercise of the power conferred by the condition (j) of the Approval Letter. The clause is in substance an 'omission' contractual provision and that power must be exercised in good faith, otherwise it would be a breach of contract following the Federal Court case of *Pembinaan Perwira Harta Sdn Bhd v Letrikon Jaya Bina Sdn Bhd* [2013] 2 AMR 210. An example of bad faith is the exercise of power to omit and permit another third party to log instead. It is undisputed that the conception of the Taman Warisan was made in the public interest as a national park. The power was therefore in my view exercised reasonably for a lawful purpose.

(See also para 37 (ante).)

[55] In the premises, an issue estoppel had arisen and the defendants were precluded from re-arguing its right to withdraw the entire concession area (the balance of what was left) by invoking para (j) of the letter of approval (see *Joseph bin Paulus Lantip & Ors v Unilever Plc* [2018] supp MLJ 151; [2012] 7 CLJ 693 at paras 30 and 32).

[56] In this connection Arifin Zakaria CJ's observations on issue estoppel in *Government of India v Petrocon India Ltd* [2016] 3 MLJ 435; [2016] 6 CLJ 321 are pertinent:

> [52] Question No 3 also raises the issue of whether estoppel would apply against the respondent in the circumstances of this case. Estoppel may be invoked in order to prevent a party from relitigating against a counter party, an issue, be it of fact or law after the same had been previously contested or decided in an earlier litigation between the same parties (see generally P Ramanatha Aiyar *The Law Lexicon* (2nd Ed Reprint, 2010) LexisNexis at pp 656–657).
>
> [53] It is settled law that for issue estoppel to operate against a party the decision on an issue must have been a 'necessary step' to the decision or 'a matter which it was necessary to decide, and which was actually decided, as the groundwork of the decision' (see *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 at p 965). To put it simply, the issue in question must have been litigated between the parties and the issue was material to the decision of the court.

[57] In our view the question of whether the logging contract had been repudiated by the issuance of a directive under condition (j) was a matter that was 'necessary to decide' and which was 'actually decided, as the ground work of the decision' in Civil Suit 136 within the meaning of the observation of Tun Arifin CJ in *Petrocon India Ltd*.

Section 3 of the GCA

[58] We now turn to the second and main issue before us which is the applicability of s 3 of the GCA or more specifically:

> Whether by virtue of section 3, Government Contracts Act 1949 ('GCA'), only written contracts, executed in the manner provided thereunder with the state government are valid.

[59] It is the plaintiff's submission that the Court of Appeal misapplied the provisions of the GCA to the facts herein. The provisions of the GCA that were relied on by the Court of Appeal are ss 2 and 3 of the GCA. Section 2 refers to contracts entered into on behalf of the government whilst s 3 relates to contracts entered into on behalf of the state government. As our case concerns the state government only s 3 is relevant. Nevertheless we reproduce below both ss 2 and 3 of the GCA for completeness:

> 2 Contracts on behalf of the Government
>
> All contracts made in Malaysia on behalf of the Government shall, *if reduced to writing*, be made in the name of the Government of Malaysia and may be signed by a Minister or by any public officer duly authorized in writing by a Minister, either specially in any particular case, or generally for all contracts below a certain value in his department or otherwise as may be specified in the authorization.
>
> 3 Contracts on behalf of a State Government
>
> (1) All contracts made in Malaysia on behalf of a State Government shall, *if reduced to writing*, be made in the name of the Government of that State, and may be signed by the Chief Minister of the State, or by any public officer duly authorized in writing by the Chief Minister, either specially in any particular case, or generally for all contracts below a certain value in his department or otherwise as may be specified in the authorization.
>
> (2) In the application of this section to Sabah and Sarawak 'Chief Minister' includes any State Minister.

This is what the Court of Appeal said in relation to the above provisions:

> The jurisprudence relating to execution of Government Contracts is anchored pursuant to the Government Contracts Act 1949 (Revised 1973) Act 1202 (GCA 1949). Essentially it displaces the common law position as well as principles relating to contract ... in our view, the government and/or government bodies may not be liable on the basis of conduct' and/or implied contract and/or acquiescence, etc ...

[60] The Court of Appeal in construing ss 2 and 3 of the GCA sought to rely on the Indian Supreme Court cases of *Seth Bikhraj Jaipuria v Union Of India* 1962 AIR 113 and *KP Chowdhary v State Of Madhya Pradesh & Ors* 1967 AIR 203; 1966 SCR (3) 919 to conclude as follows as regards s 3 of the GCA:

> ... the draft agreement in law cannot be construed as a contract without execution as well as evidence that it has been executed per the requirement of GCA 1949.

(See para 11 of the judgment of the Court of Appeal.)

[61] The Indian Supreme Court in *Bikhraj* and *KP Chowdhary* adopted a strict view of art 299 of the Indian Constitution and held that a contract between the government and a person envisages a formal written contract with no scope for an implied contract (see para 9 of the Court of Appeal judgment). Article 299 of the Indian Constitution reads as follows:

> 299 Contracts
>
> (1) All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by President, or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorize.

The Supreme Court in the *Bhikraj* and *KP Chowdhary* construed the terms of art 299(1) as mandatory and not directory and these formalities could not be waived or dispensed with.

[62] However the Indian Court have also realised that insistence on too rigid an adherence to the conditions stipulated in art 299 may not always be practicable nor equitable. As observed by Bose J (speaking for the Supreme Court) in *Chatturbhuj Vithaldas Jasani v Moreshwar Parashram And Others* 1954 AIR 236:

> It would, in our opinion, be disastrous to hold that the hundreds of Government officers who have daily to enter into a variety of contracts, often of a petty nature, and sometimes in an emergency, cannot contract orally or through correspondence and that every petty contract must be effected by a ponderous legal document couched in a particular form ...

[63] A similar stance was adopted by the Supreme Court in the case of *Union of India v AL Rallia Ram* 1963 AIR 1685 when it held that the provisions of s 175(3) of the Government of India Act 1935 (which were in pari materia with art 299(1) of the Indian Constitution) have been complied with although no formal contract was executed.

[64] The court held that the Act did not expressly provide for execution of a formal contract between the contracting parties. Thus, in the absence of any

specific direction by the Governor-General prescribing the manner or mode of entering into the contracts, the court concluded that a valid contract may result from the correspondence between the parties.

[65] The same view was echoed by the Supreme Court in the case of *Union of India & Others v NK Private Limited & Another* 1972 AIR 915; (1973) 3 SCC 388 which observed as follow:

> It is now settled by this court that though the words 'expressed' and 'executed' in Article 299(1) might suggest that it should be by a deed or by a formal written contract, a binding contract by tender and acceptance can also come into existence if the acceptance is by a person duly authorized on this behalf by the President of India.

[66] It could therefore be safely concluded from the catena of cases above that art 299 of the Indian Constitution does not require any formal document to be executed on behalf of the government in order to constitute a valid and binding contract. Any form of 'offer and acceptance' complying with art 299 of the Constitution (ie by an authorised person as prescribed in the Article) would be a valid and binding contract.

[67] In light of the above, the Court of Appeal was misconceived when it sought to rely on art 299 and the decision of the Indian Supreme Court in *Bhikraj* and *KP Chowdhary* to hold that ss 2 and 3 of the GCA require a formal written contract to be executed before it can bind the government or state government as the case may be.

[68] Although the wording of art 299 is not identical with ss 2 and 3 of the GCA, its underlying rationale, as we shall see later in the judgment, is the same and in that regard it is actually in para materia with ss 2 and 3 of the GCA.

[69] As submitted by learned counsel for the plaintiff, based on the wordings of ss 2 and 3 of the GCA, there is no mandatory requirement for a contract made in Malaysia on behalf of the government or state government to be reduced into writing as both provisions are merely worded in a contemplative manner with the use of the word 'if'. Learned counsel had referred to us the unreported decision of *Petrojasa Sdn Bhd v The State Government of Sabah* [2002] MLJU 223, where Richard Malanjum J (as he then was) concluded that there was a valid agreement between the parties by virtue of their conduct and that a formal agreement was not a mandatory requirement under the GCA.

[70] His Lordship in that case observed as follows as regards s 3 of the GCA:

> [14] Learned counsel for the defendant also submitted that there could not have been a contract as no authority was given to (anyone) to bind the defendant in

relation with the plaintiff. Obviously he was looking for a formal agreement. *But I do not think that is a mandatory requirement under the Government Contracts Act 1949. Section 3 thereof should be the answer.*

His Lordship after reviewing the evidence in the case proceeded to hold:

... it is my finding that from the undisputed facts and evidence adduced in this case the inevitable conclusion is that there was a binding agreement concluded between the Plaintiff and the Defendant albeit not formally in writing ...

[71] The factual matrix in *Petrojasa* is somewhat similar to the instant case and we think it convenient if we reproduce the following excerpt from His Lordship's judgment to understand why he held that there was a binding agreement:

[9] From the evidence of PW1, DW3 and that of DW4 together with the several letters exchanged and the fact that indeed the plaintiff was allowed to enter the timber land to extract timber inevitably lead to one conclusion in that the meeting of PW1 with DW3 did produce a result. And that result was in substance the surrender of the approved land by the plaintiff and in return for the plaintiff to have the rights to extract merchantable timber from the timber land. In short there was an agreement concluded between the plaintiff and the defendant though it might not have been formally reduced into one document. The fact that the plaintiff was issued with TOL and timber license should be an indication of some of the terms of the agreement concluded. I cannot accept the contention of learned counsel for the defendant that there was no agreement concluded due to the absence of intention to enter into any legal relationship. If that was the case then there was no explanation advanced as to why the defendant through its agencies and departments took the approved land from the plaintiff and in return issued to the plaintiff the TOL and the timber license in respect of the timber land.

[72] In the same manner, the learned judicial commissioner in Civil Suit 136 held, after examining the conduct of parties that despite the non-execution of a formal contract between the parties, there was a valid and binding agreement. The learned judicial commissioner in holding such, observed:

The conduct of the parties here, particularly the Defendant in treating the logging contract as subsisting notwithstanding the non-execution of a formal agreement and benefiting from the forest produce cess collection is akin to the conduct seen of parties in the case of *Bukit Kiara Resort Bhd v Dato Bandar Kuala Lumpur* [2012] 2 MLJ 783 ...

[73] As stated earlier in the judgment, the learned judicial commissioner went on to '... find and hold that there is a valid and binding contract between the parties in the circumstance. The terms of the logging contract comprise those in the approval letter as well as the draft formal agreement following the court of appeal case of *Nippon Express (M) Sdn Bhd v Che Kiang Realty Sdn Bhd and another appeal* [2013] MLJU 1646; [2013] 7 CLJ 713 since the letter was

not contented by the defendants in anyway. In other words the defendants had acquiesced to those terms'.

[74] Thus, although s 3 of the GCA was not raised before the learned judicial commissioner in Civil Suit 136, the principle of law as espoused by Richard Malanjum J (as he then was) in *Petrojasa* vis a vis s 3 of the GCA applies equally to the instant case given the similarity in the factual matrix.

[75] Accordingly, we agree with learned counsel for the plaintiff that the Court of Appeal misapplied the provision of the GCA to the facts herein. We also hold that the observation of His Lordship, Richard Malanjum J (as he then was) in *Petrojasa* that there is no mandatory requirement under s 3 of the GCA for a formal written agreement reflects the correct legal position insofar as s 3 of the GCA is concerned.

[76] To lend further support to the view that s 3 does not require a written contract before the government or the state government can be legally bound, it is perhaps useful to consider the parliamentary intention behind the enactment of the GCA (see *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345 at pp 358–360; [1994] 4 CLJ 285 at pp 298–299. The Government Contracts Bill ('the Bill') was tabled in Parliament on 22 December 1949.

[77] The second reading of the Bill was moved by the then attorney general who said, at p 593 of the *Hansard*:

> Sir, the Bill, the title of which I have just read out, seeks to clarify the position in the Malay States and the Settlements — Federation generally — regarding contracts made by the Government of the Federation and by the State and Settlement Governments. At the moment, the position is not at all clear. *It is not, in some cases, clear who may make the contracts or who can be sued in respect of any breach of them.* (Emphasis added.)

[78] It can be seen from the above statement that the GCA was enacted by Parliament with the intention of safeguarding the government or the state government against unauthorised contracts. This is consistent with the underlying rationale of art 299 of the Constitution of India, which is in pari materia with ss 2, 3 and 8 of the GCA. As explained by the learned authors in *Pollock & Mulla: Indian Contract & Specific Relief Acts* (Vol 1, 13th Ed) at p 334:

> The public policy and the public interest underlying art 299(1) is that 'the State should not be saddled with liability for unauthorized contracts which do not show on their face that they are made on behalf of the State'.

[79] Thus the GCA was enacted to ensure that contracts made on behalf of the government or the state government are properly and/or expressly authorised. This is to avoid any liability for contracts which are entered into without its authority, knowledge and/or consent.

[80] It is not disputed that the first defendant was authorised by the second defendant to enter into the logging contract with the plaintiff. The capacity of the first defendant to enter into the logging contract with the plaintiff, on behalf of the second defendant, was never a bone of contention between the parties in both Civil Suit 136 and Originating Summons 733.

[81] In our view, the GCA should not be used by the government or state government as 'a cloak for denial of responsibilities'. The lack of a formal contract should not serve as a loophole for the second defendant to deny its contractual responsibilities arising from the logging contract. The conduct of the parties, particularly the defendants' who benefitted from the forest produce cess collection, would make it inequitable for the defendants to now claim that there was no contract to begin with. To quote Bose J in *Chatturbhuj Vithaldas Jasani v Moreshwar Parashram And Others* at p 243:

> [40] We feel that some reasonable meaning must be attached to Art 299(1). We do not think the provisions were inserted for the sake of mere form. We feel they are there to safeguard Government against unauthorised contracts. If in fact a contract is unauthorised or in excess of authority it is right that Government should be safeguarded.
>
> On the other hand, an officer entering into a contract on behalf of Government can always safeguard himself by having recourse to the proper form. *In between is a large class of contracts, probably by far the greatest in numbers, which, though authorised, are for one reason or other not in proper form. It is only right that an innocent contracting party should not suffer because of this and if there is no other defect or objection we have no doubt Government will always accept the responsibility.* If not, its interests are safeguarded as we think the Constitution intended that they should be. (Emphasis added.)

[82] Finally, we do not think it quite accurate to say that the GCA, to use the words of the Court of Appeal 'displace(s) the common law position as well as principles relating to contract'. Instead, the GCA in our view complements the same in contracts made on behalf of the government or state government.

[83] For the reasons stated above, the question of law posed to us must be answered in the negative.

[84] The logging contract is a valid and enforceable contract between the parties and the plaintiff is entitled to claim compensation or damages from the defendant arising from the termination of the said contract.

A **[85]** The appeal is accordingly allowed with costs.

[86] The decision of the Court of Appeal is set aside and the decision of the High Court is restored.

B *Appeal allowed; decision of the COA set aside and decision of the High Court restored.*

Reported by Nabilah Syahida Abdullah Salleh

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